IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-553

PARK WEST MANAGEMENT CORP.,

Petitioner,

—against—

ARTHUR and BESS MITCHELL, et al.,

Respondents.

PETITION OF PARK WEST MANAGEMENT CORP. FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

DEMOV, MORRIS, LEVIN & SHEIN
Attorneys for Petitioner
40 West 57th Street
New York, New York 10019
(212) 757-5050

Of Counsel:

STANLEY H. FULD
A. DAVID BENJAMIN
EUGENE J. MORRIS
ARTHUR BIRNBAUM

New York, New York

INDEX

TABLE OF CASES AND AUTHORITIES

Cases:

Statutes: PAGE

Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

PARK WEST MANAGEMENT CORP.,

Petitioner,

—against—

ARTHUR and BESS MITCHELL, et al.,

Respondents.

PETITION OF PARK WEST MANAGEMENT CORP. FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioner, Park West Management Corp. ("Park West"), petitions for a writ of certiorari to review the order and opinion of the Court of Appeals of the State of New York rendered on June 7, 1979.

Opinions Below

The opinion of the Court of Appeals, reported in 47 N.Y.2d 316, 418 N.Y.S.2d 310, appears together with the order entered thereon at Appendix A, infra, pp. 1a-11aa-1. The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, reported at 62 A.D.2d 291, 404 N.Y.S.2d 115, appears at Appendix B, infra, pp. 12a-21a. The opinion of the Appellate Term of the Supreme Court of the State of New York, First Department, not officially reported, appears

at Appendix C, infra, pp. 22a-23a. The opinion of the Housing Part of the Civil Court of the City of New York, New York County ("Housing Court") not officially reported, appears at Appendix D, infra, pp. 24a-27a.

Jurisdiction

The opinion and order of the Court of Appeals were entered on June 7, 1979. See Appendix A, infra, pp. 1a-11aa-1. The time to file the petition for a writ of certiorari expired on September 5, 1979. A motion to extend petitioner's time to file was made on August 28, 1979, and, by order dated August 28, 1979, Associate Justice Harry A. Blackmun extended petitioner's time for filing to and including October 5, 1979. A copy of Justice Blackmun's order dated August 28, 1979, appears at Appendix E, infra, p. 28a. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Question Presented

The question presented—which was raised and argued in the Court of Appeals (petitioner's brief in that court, pp. 3-4; Point III, pp. 50-57)—is:

1. Whether section 235-b of the New York Real Property Law [N.Y. Real Property Law §235-b], creating a so-called warranty of habitability in all rental agreements of residential premises, was erroneously applied and construed by the Court of Appeals to nullify retroactively a *force majeure* clause in an existing residential lease antedating the statute, and, by reason thereof, constituted a violation of the Contract Clause of the United States Constitution. (Art. I, §10, cl. 1).

Constitutional Provision and the New York Statute Involved

Constitution of the United States, Article I, Section 10, clause 1:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

New York State Real Property Law, Section 235-b [L. 1975, c. 597, §1]:

> "1. In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.
>
> 2. Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.
>
> 3. In determining the amount of damages sustained by a tenant as a result of a breach of the warranty set forth in this section, the court need not require any expert testimony."

Statement of the Case

There is no real issue of fact since the parties largely agreed on what occurred and only differ on the legal impact of the facts.

Background

Petitioner Park West is the owner of a large, modern, middle-income housing complex consisting of seven eighteen-story residential buildings located on the west side of Manhattan containing 2500 apartments (R. 47).* Although unsubsidized, Park West is FHA insured and was constructed pursuant to Title I of the National Housing Act of 1949, as amended. Significantly, it is subject to New York's Rent Stabilization Law (New York City Administrative Code §YY51-1.0 et seq. [contained in McKinney's N.Y. Unconsol. Laws, Book 65]), a rent control statute, enacted in the exercise of the police-power, and, accordingly, functions under pervasive governmental regulation. It may not, by virtue of these regulations, increase rents except as allowed by the Rent Stabilization Law;** it is under legal obligation to offer renewal leases to all tenants at the expiration of their terms; and it is controlled as to the services required to be rendered to tenants under the police-power statute as well as by the

---

* References are to pages of the printed record in the Court of Appeals.

** In accordance with the Rent Stabilization Law and Code of the Rent Stabilization Association of the City of New York, Inc. ("Code"), adopted pursuant thereto, an owner may make periodic rent increases in accordance with guideline adjustments in the stabilized rent determined by the Rent Guidelines Board. The percentage increases allowed by the Board are the maximum level of lease increases which an owner may charge. Additionally, an owner may seek a further increase upon specified grounds (Code, §41), i.e., new services or new equipment within the apartment; major capital improvements to the building; and an increase based upon an owner's economic hardship (Code, §43).

other New York statutes and regulations governing the rental of residential apartments. (New York City Administrative Code, §Y51-10 et seq. and §D26-1.01 et seq.; see, also, New York Multiple Dwelling Law, McKinney's Consolidated Laws of N.Y., Book 35A.).

Genesis of the Controversy

On May 2, 1976, all porters and handymen of residential buildings in New York City—members of Employees' Union Local 32-B-J ("32-B-J")—commenced a city-wide strike which lasted for a period of 17 days (R. 33, 47), and as a result Park West (as well as other multiple dwellings in New York) experienced a reduction of services resulting from their temporary absence. For instance, routine, i.e., non-emergency, repairs were postponed and incinerators in the buildings were wired shut as a precaution against the hazard of fire (R. 74, 76). To ameliorate the inconvenience occasioned by the shutting of the incinerators, Park West provided all tenants daily with heavy-duty garbage bags and instructed them in writing to deposit their refuse in those bags, take them down in the automatic elevators and place them at the curb in front of their building for normal pick-up by the New York City Department of Sanitation ("Sanitation Department") (R. 80). The curb area—not controlled by the owner—was designated for this purpose by the Sanitation Department (R. 166-167). For the first week of the 17 day strike, Sanitation Department employees engaged in a "wildcat" sympathy strike and refused to collect garbage from the curbside until the declaration of a Health Emergency by the New York City Department of Health ("Health Department") (R. 111, 168, 204).

Except for the fact that halls were not cleaned and routine maintenance was not kept up, all other services

in the buildings were fully performed (R. 73-76). Although non-essential repairs were deferred, emergency repairs were handled by management personnel who worked and were paid for overtime. The elevators, boilers, letter boxes and other vital services were fully available at all times since they were automatically controlled (R. 76). Throughout the period of the strike, management provided and paid for extra guard service and all non-striking employees worked overtime—at overtime rates—to maintain services throughout the buildings. Exterminating services were also made available at night when the exterminators did not have to pass picket lines (R. 165).

Significantly, the cost of the extra personnel hired and the overtime supplied during the strike counterbalanced the saving which resulted from not paying the striking employees (R. 77, 174). In other words, the owner gained no financial advantage in the cost of operation of the property during the strike since expenditures remained about the same as they had been prior to the strike (R. 77). Moreover, following termination of the strike petitioner had its employees work overtime in order to catch up with the deferred non-emergency maintenance work as quickly as possible; as a result, building conditions were back to normal a few days after the strike ended (R. 76, 164).

Several tenants of Park West, of whom respondents Arthur and Bess Mitchell ("Mitchell") are representative, went on a rent strike and refused to pay their rent for the month of June, 1976, asserting that the owner had breached the implied warranty of habitability created by section 235-b of the Real Property Law (R. 33, 40).* In

* It was agreed, by stipulation in the Housing Court that the Mitchells' case would be determinative of approximaetly 400 other pending cases involving Park West tenants. None of the other 2100 tenants made claims.

the Housing Court, each party, in lieu of trial submitted —pursuant to stipulation—written statements of the facts describing the circumstances and effects of the strike (R. 44). Although the statements differ in emphasis, there is no real factual difference between them.

The Mitchell lease, as well as the leases of many of the other tenants-respondents herein, was executed in October of 1973 (R. 31) nearly two years prior to the effective date of section 235-b, and contained a *force majeure* clause (R. 48) which provided, *inter alia*, that the landlord was not to be liable for failure to render services where:

> "Landlord is prevented or delayed from so doing by reason of any cause beyond landlord's reasonable control, including but not limited to, strike or other labor trouble, Act of God or of the public enemy, . . ." *

Based on the facts before it, the trial court, constrained by a prior determination of an appellate court (*Goldner* v. *Doknovitch*, 88 Misc.2d 88, 388 N.Y.S.2d 504 [App. Term, N.Y.Co. 1976]), decided that the tenants were entitled to a 10% reduction of the May, 1976 rent as damages for the breach of the implied warranty of habitability. Although it reached this conclusion, the trial court was moved to observe (Appendix D, infra, p. 26a):

> "[I]t must be noted that the accumulation of garbage on the sidewalk, with the attendant stench dispersal by the elements and the increase in vermin was caused by the refusal of the city sanitation men to collect and remove the accumulation until the declaration of a

---

* The full text of this *force majeure* clause is set forth in Appendix F, infra, p. 29a.

health emergency by appropriate authorities.* In addition, cognizance must be taken of the efforts of management to provide services through alternate methods. If this were not the case, and management were to be penalized for any and all interruptions beyond their control, despite such alternative methods there would then be no inducement for management to seek such alternatives and the situation would then tend to worsen."

The Appellate Division, the first higher appellate court in New York to rule on the meaning of section 235-b, also decided against Park West; it held that the statute applied to the strike situation despite the *force majeure* clause and rejected the argument that the retroactive application of section 235-b violated the Contract Clause of the Constitution and deprived petitioner of due process. The Appellate Division's decision, in effect, made the owner a guarantor of all services for which the tenant contracted and required him to pay the tenant whenever he is deprived of any service contemplated by the lease agreement. (Appendix B, infra, pp. 12a-21a).

In the Court of Appeals, Park West argued, *inter alia*, that none of the omitted services rendered the space uninhabitable or hazardous or detrimental to life, health or safety and, consequently, that the failure to furnish such services could not constitute, or be treated as, a violation of the implied warranty created by section 235-b. The Court of Appeals, however, seized upon the Health Department's declaration of a health emergency (actually made about one week after commencement of the 17 day strike [R. 111, 168, 204] as indicating such a hazard.* In

* Although the health emergency was declared about a week after the strike began, the court granted a reduction of rent based on a 17 day non-removal, i.e., the entire period of the strike.

so doing, the court ignored the fact that Park West had no control over the striking New York City Sanitation Department workers who refused to remove the garbage from the city street—over which the owner of course had no control —until the Health Department declared a health emergency. Thus, the Court of Appeals held that petitioner, as a residential lessor, was strictly liable to its tenants for the service disruption occasioned not by any acts or omissions on its own part but solely by those of its striking employees and of other parties beyond its control (Appendix "A", pp. 1a-11a).* This is what the Court of Appeals wrote (Id., infra, p. 7a):

> "the statute [Section 235-b] places an unqualified obligation on the landlord to keep the premises habitable, conditions occasioned by ordinary deterioration, work stoppages by employees, acts of third parties or natural disaster are within the scope of the warranty . . ."

As indicated, we believe the construction thus accorded the statute is erroneous. However, even assuming that it could be so read *prospectively,* it was—as petitioner argued in the Court of Appeals (Park West Brief, pp. 2-3, Point III, pp. 50-57)—constitutionally impermissible for that tribunal to apply it *retroactively* to leases executed prior to its enactment.

---

* It should be noted that the statute expressly exculpates an owner from liability where breach of the warranty was "caused by the misconduct of the tenant or lessee or other persons under his direction or control." Incongruously, the Court of Appeals in the instant case has held the owner liable for the acts of complete strangers over whom it concededly exercised no direction or control.

Reasons for Granting the Petition

Apart from the importance of the question involved as it relates to rental housing in New York and the grave constitutional question it raises, the decision of the Court of Appeals impacts upon courts and legislatures throughout the country. As the opinion of the court (*per* Cooke, Ch. J.) indicates, section 235-b providing for the warranty of habitability reflected a "departure from the antiquated common-law rules governing the modern landlord-tenant relationship" and, "discarded," in effect, "the obsolete doctrine of the lease as a conveyance of land." (47 N.Y.2d 316, at 324, 325, 418 N.Y.S.2d 310, at 314; Appendix A, infra, pp. 3a, 4a).

Indeed, there can be no doubt that section 235-b effected a "significant" change in the law as it existed. In fact, the Governor's Memorandum approving the bill which became section 235-b explicitly declared (N.Y. Legis. Ann., 1975, p. 437; also McKinney's Session Laws of New York, 1975, pp. 1760-1761):

> "The bill represents a significant beneficial change in the law of landlord and tenant. . . . By one large step this bill moves the law of landlord and tenant into the twentieth century."

Similar implied warranty of habitability statutes have already been enacted in a number of states and are being considered by many others.*

---

* See, e.g., *Teller* v. *McCoy*, 253 S.E.2d 114 (W.Va. 1978); *Fair* v. *Negley*, 390 A.2d 240 (Pa. Super.Ct. 1978); *Pugh* v. *Holmes*, 384 A.2d 1234 (Pa. Super.Ct. 1978); *Kamarath* v. *Bennett*, 568 S.W.2d 658 (Tex. 1978); W.Va. Code §37-6-30 (Cum. Supp. 1979); Alaska Stat. §34.03.100 (1975); Minn. Stat. Ann. §504.18(1) (West Supp. 1978); Haw. Rev. Stat. §521-42 (1978); See also Note, *New York's Search For An Effective Implied*

The harsh construction placed upon this statute by the New York courts, and rendered even more egregious by being applied retroactively, amounts not only to a violation of the Contract Clause of the Constitution but to a confiscation of private property since it renders the owner an insurer of services to the tenant, irrespective of fault. The decision, if allowed to stand, can have a most deleterious effect on the nationwide movement to put an end to the obsolete doctrine of the lease as a conveyance of land. Its inequity, coupled with its unreasonable and unfair impact upon owners of residential multiple dwellings could result in substantial curtailment of investment in such property wherever it is applied and, additionally, inhibit salutary efforts to conform the law of landlord and tenant to the needs of today.

Moreover, and on a very practical level when it is borne in mind that, by virtue of the Court of Appeals decision section 235-b is superimposed upon property already comprehensively regulated by local police-power statutes (the Rent Stabilization Law and local housing regulations) and by the federal regulatory mechanisms applicable to FHA and Title I projects, we can more fully appreciate the severity of its adverse impact on the private ownership of residential housing in the future. Since practically all other segments of our free enterprise economy are permitted to operate largely without regulation and freely

---

Warranty of Habitability In Residential Leases, 43 Alb.L.Rev. 661 (1979); Note, *The Implied Warranty of Habitability in Residential Leases,* 81 W.Va. L. Rev. 81 (1979); Note, *Implied Warranty of Habitability In Residential Leases,* 17 Duq. L. Rev. 215 (1978-79); Note, *Non-Waiver of the Implied Warranty of Habitability in Residential Leases,* 10 Loyola (Chic.) L. Rev. 41 (1978); Note, *Washington's Implied Warranty of Habitability: Reform of Illusion,* 14 Gonz. L. Rev. 1 (1978); Note, *There Is An Implied Warranty In A Residential Lease That The Dwelling Is Habitable and Fit For Living,* 10 Texas Tech. L. Rev. 228 (1978).

in response to the exigencies of the market place, section 235-b imposes an inordinate burden upon the ownership and management of rental residential real property. This burden must necessarily have a chilling effect upon the desirability of this type of investment, and as a consequence, contribute to the accelerating deterioration and abandonment of residential rental property. Likewise, it could inhibit the development of much needed new residential rental properties thereby exacerbating existing housing problems.*

I.

Real Property Law Section 235-b as Interpreted and Applied by the Court of Appeals Impairs the Right of Private Contract and, Accordingly, Is Unconstitutional as Violative of the Contract Clause of the United States Constitution (Art. I, §10, Cl. 1).

Reduced to its essentials, the record reveals a most dire situation: the owner of a large housing development, already extensively regulated by the federal government—under Title I and FHA mortgage insurance regulations as well as by state police-power statutes controlling rents collected and services rendered—is, in addition, deprived retroactively of private contract rights between itself and its tenants by the new statute (§235-b).

It should be noted that in his opinion for the court, Chief Judge Cooke, citing *Tonetti* v. *Penati*, 48 A.D.2d

---

* In an editorial prompted by the decision of the Court of Appeals in this case the New York Times observed, *inter alia*, that "landlords may be asked to shoulder an unreasonable and even absurd burden" and that "frightening landlords out of the business will not make leases any more equitable nor housing any more habitable." N.Y. Times, July 7, 1979, at 16, cols. 1 and 2; a copy of the New York Times editorial appears at Appendix G, infra, pp. 30a-31a.

25, 367 N.Y.S.2d 804, and two other cases, wrote (47 N.Y. 2d at 325, 418 N.Y.S.2d at 314) that section 235-b "codif[ied]" existing case law. This, we submit was erroneous; reliance on the decisions cited overlooked a crucial distinction between them and section 235-b. In the *Tonetti* case, for instance, the court had specifically held that the implied warranty applies "*unless expressly excepted*" in the lease (48 A.D.2d at 30, 367 N.Y.S.2d at 808)—and that effectively differentiates the case from the statute which, in so many words, in subdivision 2, renders "void" any agreement by the tenant "waiving or modifying his rights as set forth in this section [235-b]."

Be that as it may—as we noted above (p. 10)—the Governor, in his Memorandum approving the bill which became section 235-b, expressly stated that it represents "a significant * * * change in the law of landlord and tenant * * * [and] moves the law of landlord and tenant into the twentieth century." (N.Y. Legis. Ann. 1975, p. 437; also McKinney's Session Laws of New York, 1975, pp. 1760-1761.) And, as was to be expected, several New York lower courts concurred in the view expressed by the Governor, declaring that the statute "clearly enlarges substantive rights and obligations" (*Francais* v. *Cusa Bros.*, 53 A.D.2d 24, 27, 385 N.Y.S.2d 183, 185 [3d Dept. 1976]; see, also, *Kaplan* v. *Coulston*, 85 Misc.2d 745, 747, 381 N.Y.S.2d 634 [Civ. Ct. Bronx Co. 1976].

In short, the Court of Appeals in the case now under consideration has held ineffective the *force majeure* clause in a contract executed two years prior to the effective date of the statute. Thus, its decision poses the question as to whether its construction of section 235-b infringes constitutional limitations imposed by the Contract Clause.

That the right of Park West to the protection of the *force majeure* clause in its lease is a substantial one is

well illustrated by the present case.* The owner, Park West, has been held liable to its tenants not only for the strike of its employees but, additionally, for the "wildcat" strike of New York City employees.

It is fundamental and well established law that a statute which creates new substantive rights and duties may not be applied retroactively to alter previously established relationships or substantially impair contractual obligations. See, generally, *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234 (1978); *United States Trust Co. of New York* v. *State of New Jersey,* 431 U.S. 1 (1977); *Murray* v. *Charleston,* 96 U.S. 449 (1877). In the latter case this Court long ago stated that the inviolability of contracts and the concomitant duties arising therefrom are at the foundation of a well-ordered society. It is respectfully submitted that it is this very rationale which is determinative of the instant case. In the *United States Trust* case, 431 U.S. 1, *supra,* it was stated (at 17):

> "It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties. Fletcher v. Peck, 6 Cranch 87 (1810); Dartmouth College v. Woodward, 4 Wheat. 518 (1819)."

The dissenters in that case characterized the majority's decision as a remolding of "the Contract Clause into a potent instrument for overseeing important policy determinations of the state legislature" (431 U.S. at 33). This "potent instrument" should, we submit, be applied in the

---

* As noted above (supra, p. 7), the leases expressly recited that the landlord shall not be liable for failing to render services to tenants when he is "prevented . . . from so doing by reason of any cause beyond landlord's reasonable control, including, but not limited to, strike or other labor trouble."

instant case since New York has materially altered and impaired petitioner's contract rights in an exceedingly harsh and oppressive a manner.

More recently, in *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234, *supra,* this Court had occasion to consider a situation involving the impairment of private contractual obligations. A Minnesota statute was held to impose retroactively terms upon a pension contract between a private company and its employees. Declaring that such retroactive application "worked a severe, permanent and immediate change in those relationships—irrevocably and retroactively" (at 250), this Court concluded that it violated the Contract Clause of the Constitution.

Here, as in that case, there can be no question as to the impact of section 235-b upon petitioner's contract—the lease agreement—with its tenants in Park West Village by the statutory nullification of the *force majeure* clause. Thus, the inquiry here, as in the *Allied Structural Steel* case, becomes a search for the "limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police-power" (438 U.S. at 242). Mr. Justice Stewart, speaking for the Court, after observing that the Court must first ascertain "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship" (at 244), went on to say (at 245):

> "The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation."

> "The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them."

In the present case the parties had freely negotiated the initial lease terms and, in so doing, incorporated, among other provisions, the *force majeure* clause common to such agreements. Some two years later, section 235-b was enacted and construed by the Court of Appeals as invalidating the *force majeure* provision though under the police-power statute the parties remained bound by all other provisions of their lease. Consequently, to cull from the opinion in *Allied Structural Steel* (438 U.S. at 247), the statute is violative of the Contract Clause of the Constitution since it "nullifies express terms of the [owner's] contractual obligations and imposes a completely unexpected liability".

Moreover, there is, significantly, no showing in the present case that the severe disruption of contractual expectations was necessary to meet an important general social problem. (Cf. *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U.S. 398). In fact, section 235-b is not a police-power statute enacted to deal with an emergency situation as was the statute in *Blaisdell.* Here, no legislative declaration of emergency accompanied the enactment of the statute; clearly, it is quite different from New York's temporary rent control statute. Unlike the latter statute, section 235-b, far from being an interim "emergency" provision is a permanent part of the law of landlord and tenant in the State of New York. Its enactment was conceived in terms

of a fundamental revision of the basic concept of a residential lease (see Appendix "A", opinion of Court of Appeals, pp. 3a-5a). The profound change in fundamental law thus effected is a far cry from the temporary Minnesota mortgage moratorium law upheld by this Court in the *Blaisdell* case, 290 U.S. 398, *supra.**

In the *Allied Structural Steel* case, 438 U.S. 234, *supra,* this Court summarized the following five conditions—none of which accompanied the passage of section 235-b—upon which this Court sustained Minnesota's legislative enactment in *Blaisdell* (438 U.S. at 242):

> "First, the state legislature [in Blaisdell] had declared in the Act itself that an emergency need for the protection of home owners existed. Id., at 444. Second, the state law was enacted to protect basic societal interest, not a favored group. Id., at 445. Third, the relief was appropriately tailored to the emergency that it was designed to meet. Ibid. Fourth, the imposed conditions were reasonable. Id., at 445-447.

---

* The New York rent control laws have since the post World War I housing shortage been justified entirely on the basis of a police power response to an emergency situation which justifies impairment of the Contracts Clause. (See, *People ex rel. Durham Realty Corp.* v. *LaFetra,* 230 N.Y. 429, 130 N.E. 601 [1921]); *Teeval Co.* v. *Stern,* 301 N.Y. 346, 93 N.E.2d 884 (1950); *8200 Realty Corp.* v. *Lindsay,* 27 N.Y.2d 124, 313 N.Y.S.2d 733 [1970]). In *Lincoln Building Associates* v. *Barr,* 1 N.Y.2d 413, 420, 153 N.Y.S.2d 633, 639 (1956), the court observed that rent controls "ought not achieve a status of permanence [since] . . . [t]hey have no justification except in periods of emergency". (Cf. *Israel* v. *City Rent and Rehabilitation Adm. of the City of New York,* 285 F. Supp. 908, 810 [S.D.N.Y. 1968] citing with approval *Lincoln Building Associates* v. *Barr, supra;* see also, *Eisen* v. *Eastman,* 421 F.2d 560, 567 [2d Cir. 1969]; *Somerset-Wilshire Apts., Inc. et al.* v. *Lindsay, et al.,* 304 F.Supp. 273, 274 [S.D.N.Y. 1969]; *Stoneridge Apts. Co.* v. *Lindsay,* 303 F.Supp. 677, 680 [S.D.N.Y. 1969].) As previously stated, no finding of an emergency accompanied the enactment of section 235-b and significantly, the legislative history of the statute reveals that it was not enacted to deal with emergency conditions.

And, finally, the legislation was limited to the duration of the emergency."

In sharp contrast, the circumstances presented in the instant case parallel those in the cases in which this Court held that retroactive application of a statute effected an infringement of a private contract and violated the Contract Clause. (See, e.g., *W. B. Worthen Co.* v. *Thomas,* 292 U.S. 426 [1933], Arkansas Law retroactively exempting life insurance proceeds from judgment creditors; *W. B. Worthen Co.* v. *Kavanaugh,* 295 U.S. 56 [1934], Arkansas Law diluting retroactively the rights and remedies of mortgage bond holders; *Treigle* v. *Acme Homestead Assn.,* 297 U.S. 189 [1935], Louisiana Law which modified, retroactively, the withdrawal rights of members of a building and loan association; *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234, *supra,* Minnesota Law which retroactively changed rights and liabilities under an existing pension plan).

As in the *Allied Structural Steel* case, it is not necessary for this Court to find section 235-b "without moderation or reason or [made] in a spirit of oppression" (*W. B. Worthen Co.* v. *Kavanaugh,* 295 U.S. at 60) in order to find that its provisions violated the Contract Clause. It is sufficient that the retroactive impairment of contractual obligations effected by section 235-b was "substantial and severe" and that the statute was not designed to meet an emergency or overcome what otherwise might be a legitimate exercise of the state's police-power.

Thus, under the doctrine enunciated in this Court's decisions, interference by New York—through its legislature and courts—with the preexisting contract rights of the parties by foisting liability upon owners for damages resulting from strikes and inhibiting their ability to nego-

tiate freely in labor disputes is violative of the Contract Clause. And when, in addition, an owner is also held liable for the acts stemming from a "wildcat" strike by third parties not under its control, the severity and substantiality of the retroactive impairment of contractual rights is starkly revealed.

CONCLUSION

Because of the nationwide movement to engraft upon residential leases an implied warranty of habitability it is important that this Court pass upon and announce the permissible limits within which this new and evolving legal concept may operate.

For these reasons, a writ of certiorari should issue to review the opinion and order of the New York Court of Appeals.

Dated: New York, New York
October 2, 1979

Respectfully submitted,

DEMOV, MORRIS, LEVIN & SHEIN
Attorneys for Petitioner
40 West 57th Street
New York, New York 10019
(212) 757-5050

Of Counsel:

STANLEY H. FULD
A. DAVID BENJAMIN
EUGENE J. MORRIS
ARTHUR BIRNBAUM

New York, New York

APPENDIX

Exhibit A

(Opinion and Order of the Court of Appeals)

Chief Judge COOKE.

Under the traditional common-law principles governing the landlord-tenant relationship, a lease was regarded as a conveyance of an estate for a specified term and thus as a transfer of real property. Consequently, the duty the law imposed upon the lessor was satisfied when the legal right of possession was delivered to the lessee. The lessor impliedly warranted only the continued quiet enjoyment of the premises by the lessee. This covenant of quiet enjoyment was the only obligation imposed upon the landlord which was interdependent with the lessee's covenant to pay rent. As long as the undisturbed right to possession of the premises remained in the tenant, regardless of the condition of the premises, the duty to pay rent remained unaffected.

Because the common law of leasehold interests developed in rural, agrarian England, the right to possession of the land itself was considered the essential part of the bargain; structures upon the land were deemed incidental. Thus, notwithstanding that the building may have constituted the substantial part of the tenant's consideration for entering into the lease, its destruction did not suspend his duty to pay the entire rent or afford him the right to rescind the lease (see 2 Powell, Real Property, par 233 *et seq.*). Indeed, even if the landlord had expressly covenanted to repair structures on the demised premises, that promise was considered ancillary to the tenant's obligation to pay rent. Hence, the failure of the lessor to perform the obligations imposed by his promise to repair gave the lessee only the right to maintain an action for damages; it did

not vest in him a defense to an action grounded upon nonperformance of his covenant to pay rent (1 American Law of Property [Casner ed], § 3.79).

As society slowly moved away from an agrarian economy, the needs and expectations of tenants underwent a marked change. No longer was the right of bare possession the vital part of the parties' bargain. The urban tenant seeks shelter and the services necessarily appurtenant thereto—heat, light, water, sanitation and maintenance. Unfortunately, the early attempts of the common law to adapt to the changes encompassed by this societal transition and to mitigate the severity of the rule holding that the tenant's covenant to pay rent was independent of all but the most basic of the landlord's obligations proved less than satisfactory.

The harshness of the common-law rule was mitigated to a degree by decisions holding that performance of a tenant's covenant to pay rent was excused when the premises were destroyed through no fault of his own (e.g., *Graves* v. *Berdan*, 26 NY 498, 501). Subsequent judical holdings expanded the scope of the landlord's covenant of quiet enjoyment to include a duty to refrain from any act or omission which would render the premises unusable by the tenant (e.g., *Tallman* v. *Murphy*, 120 NY 345, 351-352). Again, however, development of this theory of constructive eviction did not meet the needs of tenants in a society rapidly undergoing urbanization and, as a practical matter, was of no aid in helping them obtain essential services. It simply afforded the tenant the option to abandon the premises and cease paying rent if the failure of services was sufficiently severe. While the constructive eviction principle mollified the rigors of the common law to some extent, it was fraught with uncertainty, for the reasonable-

ness of the tenant's action was subject to the vicissitudes of judicial review in an action by the landlord. If the condition of the dwelling was later determined not to have justified vacation of the premises, the tenant remained liable for unpaid rent. Further, rescission of the lease and abandonment of the premises did not spur landlords into making necessary repairs in locales in which the demand for housing greatly exceeded its supply and compelled tenants living in uninhabitable premises to undergo the expense of locating new premises and moving their belongings. Thus, since the common law imposed no implied service obligations on the landlord, maintenance and other essential services often were never performed, especially in low-income neighborhoods.

These early attempts presaged a distinct trend among courts and legislatures toward characterizing a lease of residential property as a contract containing an implied warranty of habitability interdependent with the covenant to pay rent (e.g., *Pines* v. *Perssion,* 14 Wis 2d 590; *Brown* v. *Southall Realty Co.,* 237 A2d 834 [DC]). A number of factors mandated departure from the antiquated common-law rules governing the modern landlord-tenant relationship. The modern-day tenant, unlike his medieval counterpart, is primarily interested in shelter and shelter-related services. He is usually not competent to perform maintenance chores, even assuming ability to gain access to the necessary equipment and to areas within the exclusive control of the landlord (see *Javins* v. *First Nat. Realty Corp.,* 428 F2d 1071, 1077-1078, cert den 400 US 925). Since a lease is more akin to a purchase of shelter and services rather than a conveyance of an estate, the law of sales, with its implied warranty of fitness (Uniform Commercial Code, § 2-314) provides a ready analogy

that is better suited than the outdated law of property to determine the respective obligations of landlord and tenant (*Green* v. *Superior Ct.*, 10 Cal 3d 616, 626-627).

The transformation of the nature of the housing market occasioned by rapid urbanization and population growth was further impetus for the change. Well-documented shortages of low- and middle-income housing in many of our urban centers has placed landlords in a vastly superior bargaining position, leaving tenants virtually powerless to compel the performance of essential services. Because there is but a minimal threat of vacancies, the landlord has little incentive to voluntarily make repairs or ensure the performance of essential services (see *Boston Housing Auth.* v. *Hemingway,* 363 Mass 184, 197-198; *Javins* v. *First Nat. Realty Corp.*, 428 F2d 1071, 1079-1081, *supra*). While it is true that many municipalities have enacted housing codes setting minimum safety and sanitation standards, historically those codes could be enforced only by municipal authorities (*Davar Holdings* v. *Cohen,* 280 NY 828, but see L 1977, ch 849, § 13).

In short, until development of the warranty of habitability in residential leases, the contemporary tenant possessed few private remedies and little real power, under either the common law or modern housing codes, to compel his landlord to make necessary repairs or provide essential services. Initially by judicial decision (e.g., *Tonetti* v. *Penati,* 48 AD2d 25; *Jackson* v. *Rivera,* 65 Misc 2d 468; *Morbeth Realty Corp.* v. *Velez,* 73 Misc 2d 996; *Steinberg* v. *Carreras,* 74 Misc 2d 32) and ultimately by legislative enactment in August, 1975, the obsolete doctrine of the lease as a conveyance of land was discarded. Codifying existing case law, the enactment of section 235-b

of the Real Property Law (L 1975, ch 597, as amd), placed "the tenant in parity legally with the landlord" (1975 Sen J 7766-7776 [remarks of Senator Barclay]). A residential lease is now effectively deemed a sale of shelter and services by the landlord who impliedly warrants: first, that the premises are fit for human habitation; second, that the condition of the premises is in accord with the uses reasonably intended by the parties; and, third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety.[1]

Petitioner is the owner of Park West Village, an apartment complex comprised of seven highrise buildings on the Upper West Side of Manhattan. For a 17-day period in May, 1976, petitioner's entire maintenance and janitorial staff did not report to work due to a strike by members of Employees' Union Local 32-B. As a result of the strike, the tenants of Park West Village suffered extensive service interruptions which prompted some of them to withhold rent for the period encompassed by the strike.

---

[1] The statutes provides:

"1. In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.

"2. Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.

"3. In determining the amount of damages sustained by a tenant as a result of a breach of the warranty set forth in this section, the court need not require any expert testimony."

Exhibit A

Petitioner commenced this summary nonpayment proceeding in the Civil Court of the City of New York. Respondent raised the affirmative defense that, as a result of the strike, petitioner had not provided essential services and had allowed conditions dangerous to the health of tenants to exist on the premises, constituting a breach of its implied warranty of habitability. By stipulation, the parties agreed that the decision rendered in the instant proceeding would bind some 400 tenants of Park West Village similarly situated. The parties further stipulated that in lieu of calling witnesses, they would submit written statements describing the extent and effect of the service interruptions caused by the strike. Hence, there is presented only the legal question of whether the conditions existing at Park West Village throughout the duration of the strike constituted a breach of the implied warranty of habitability.

During the strike, the entire complement of porters and handymen at the complex—some two thirds of the entire work force—did not report to work. All of the incinerators were wired shut, compelling tenants to dispose of refuse at the curbs in paper bags supplied by the landlord. Because employees of the New York Sanitation Department refused to cross the striking employees' picket lines, uncollected trash piled up to the height of the first floor windows. Exposure of the accumulated garbage to the elements caused it to fester and exude noxious odors, eventually necessitating the declaration of health emergency at the complex by the New York City Department of Health. Regular exterminating service was not performed which, together with the accumulated garbage, created conditions in which rats, roaches and vermin flourished. Routine maintenance service was not performed, common areas

remained uncleaned and sporadic interruptions of other services plagued the development. Civil Court determined that the conditions at the complex constituted a breach of the implied warranty of habitability and found that the loss in rental value of the apartments sustained by the tenants justified a reduction of 10% in their June rent bill. Both the Appellate Term and the Appellate Division affirmed, the latter court granting petitioner leave to appeal to this court.

Petitioner maintains, and rightfully so, that a landlord is a guarantor of every amenity customarily rendered in the landlord-tenant relationship. The warranty of habitability was not legislatively engrafted into residential leases for the purpose of rendering landlords absolute insurers of services which do not affect habitability. Rather section 235-b of the Real Property Law was designed to give rise to an implied promise on the part of the landlord that both the demised premises and the areas within the landlord's control are fit for human occupation at the inception of the tenancy and that they will remain so throughout the lease term.

The scope of the warranty includes, of course, conditions caused by both latent and patent defects existing at the inception of and throughout the tenancy. However, as the statute places an unqualified obligation on the landlord to keep the premises habitable, conditions occasioned by ordinary deterioration, work stoppages by employees, acts of third parties or natural disaster are within the scope of the warranty as well (cf. Uniform Residential Landlord and Tenant Act, § 2.104). Inasmuch as the landlord is vested with the ultimate control and responsibility for the building, it is he who has a corresponding nondelegable and nonwaivable duty to maintain it. The obligation of the tenant

to pay rent is dependent upon the landlord's satisfactory maintenance of the premises in habitable condition.

Naturally, it is a patent impossibility to attempt to document every instance in which the warranty of habitability could be breached. Each case must, of course, turn on its own peculiar facts. However, the standards of habitability set forth in local housing codes will often be of help in resolution of this question. Substantial violation of a housing, building or sanitation code provides a bright-line standard capable of uniform application and, accordingly, constitutes prima facie evidence that the premises are not in habitable condition. However, a simple finding that conditions on the lease premises are in violation of an applicable housing code does not necessarily constitute automatic breach of the warranty. In some instances, it may be that the code violation is *de minimis* or has no impact upon habitability. Thus, once a code violation has been shown, the parties must come forward with evidence concerning the extensiveness of the breach, the manner in which it impacted upon the health, safety or welfare of the tenants and the measures taken by the landlord to alleviate the violation (see *Javins* v. *First Nat. Realty Co.*, 428 F.2d 1071, 1082, *supra; Jack Spring, Inc.* v. *Little*, 50 Ill. 2d 351, 366; *King* v. *Moorehead*, 495 SW2d 65, 76 [Mo.]; cf. *Mease* v. *Fox*, 200 NW2d 791, 796-797 [Iowa]).

But, while certainly a factor in the measurement of the landlord's obligation, violation of a housing code or sanitary regulation is not the exclusive determinant of whether there has been a breach. Housing codes do not provide a complete delineation of the landlord's obligation, but rather serve as a starting point in that determination by establishing minimal standards that all housing must meet (see *Boston Housing Auth.* v. *Hemingway*, 363 Mass. 184, 200-

201, n. 16, *supra*). In some localities, comprehensive housing, building or sanitation codes may not have been enacted; in others, their provisions may not address the particular condition claimed to render the premises uninhabitable. Threats to the health and safety of the tenant—not merely violations of the codes—determines the reach of the warranty of habitability.

A residential lease is essentially a sale of shelter and necessarily encompasses those services which render the premises suitable for the purpose for which they are leased. To be sure, absent an express agreement to the contrary, a landlord is not required to ensure that the premises are in perfect or even aesthetically pleasing condition; he does warrant, however, that there are no conditions that materially affect the health and safety of tenants. For example, no one will dispute that health and safety are adversely affected by insect and rodent infestation, insufficient heat and plumbing facilities, significantly dangerous electrical outlets or wiring, inadequate sanitation facilities or similar services which constitute the essence of the modern dwelling unit. If, in the eyes of a reasonable person, defects in the dwelling deprive the tenant of those essential functions which a residence is expected to provide, a breach of the implied warrant of habitability has occurred.

Under the facts presented here, respondents have proven that petitioner breached its implied warranty of habitability. As a result of the strike, essential services bearing directly on the health and safety of the tenants were curtailed, if not eliminated. Not only were there numerous violations of housing and sanitation codes (e.g., Administrative Code of City of New York, §§ D26-11.01, D26-11.03, D26-11.05, D26-13.03, D26-14.03, D26-22.03), but conditions of the premises were serious enough to necessitate the dec-

laration of a health emergency. In light of these factors, it ill behooves petitioner to maintain that the tenants suffered only a trifling inconvenience. Rather, the failure of petitioner to provide adequate sanitation removal, janitorial and maintenance services materially impacted upon the health and safety of the tenants and permitted them an abatement in their contracted-for rent.[2]

Problematical in these cases is the method of ascertaining damages occasioned by the landlord's breach. That damages are not susceptible to precise determination does not insulate the landlord from liability (*Green* v. *Superior Ct.*, 10 Cal 3d 616, 638-639, *supra*; see *Matter of Rothko*, 43 NY2d 305, 322-323; *Wakeman* v. *Wheeler & Wilson Mfg. Co.*, 101 NY 205, 209). Inasmuch as the duty of the tenant to pay rent is coextensive with the landlord's duty to maintain the premises in habitable condition, the proper measure of damages for breach of the warranty is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach. The award may take the form of a sum of money awarded the tenant in a plenary action or a percentage reduction of the contracted-for rent as a setoff in summary nonpayment proceeding in which the tenant counterclaims or pleads as a defense breach by the landlord of his duty to maintain the premises in habitable condition. We do not comment upon the availability of other remedies not implicated under the facts presented here.

In ascertaining damages, the finder of fact must weigh the severity of the violation and duration of the conditions giving rise to the breach as well as the effectiveness of

---

[2] It is noted that the statute we construe today speaks only of residential property used for such a purpose.

steps taken by the landlord to abate those conditions. Since both sides will ordinarily be intimately familiar with the conditions of the premises both before and after the breach, they are competent to give their opinion as to the diminution in value occasioned by the breach (*Teerpenning* v. *Corn Exch. Ins. Co.*, 43 NY 279, 282; Richardson, Evidence [10th ed], § 364, subd n). Indeed, the Legislature has instructed that in ascertaining the diminished market value of these dwellings, expert testimony is not required (Real Property Law, § 235-b, subd 3).

The record here amply supports the 10% reduction in rent ordered by Civil Court. Given the severity of the conditions existing on the premises during the strike and the feeble attempts by petitioner to alleviate the dangers to the health and safety of the tenants, there is no basis for disturbing the award.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Judges JASEN, GABRIELLI, JONES, WACHTLER and FUCHSBERG concur with Chief Judge COOKE.

Order affirmed.

Appendix A

(Order of the Court of Appeals)

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

THE HON. LAWRENCE H. COOKE,

Chief Judge, Presiding

---

1 No. 250

PARK WEST MANAGEMENT CORP.,

Appellant,

VS.

ARTHUR AND BESS MITCHELL, *et al.*,

Respondents.

The appellant in the above entitled appeal appeared by Demov, Morris, Levin & Shein; the respondents appeared by Kent Karlsson.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Cooke, Ch.J. Concur: Jasen, Gabrielli, Jones, Wachtler and Fuchsberg, JJ.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Civil Court, City of New York, New York County, there to be proceeded upon according to law.

Appendix A

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

Court of Appeals, Clerk's Office, Albany,
June 7, 1979.

[SEAL]

Exhibit B

(Opinion of the Appellate Division, First Department)

SUPREME COURT, APPELLATE DIVISION

First Department

February 1978

1981

Vincent A. Lupiano, J.P.,
Myles J. Lane,
Arthur Markewich,
Leonard H. Sandler, JJ.

Park West Management Corp.,

Petitioner-Landlord-Appellant,

against

Arthur and Bess Mitchell, et al.,

Respondents-Tenants-Respondents.

Appeal from an order of the Appellate Term of the Supreme Court, First Judicial Department, entered June 23, 1977, affirming a judgment of the Civil Court of the City of New York, New York County, entered February 7, 1977.

Eugene J. Morris of counsel (Michael J. De Zorett with him on the brief; Demov, Morris, Levin & Shein, attorneys) for petitioner-landlord-appellant

Exhibit B

Kent Karlsson, attorney for respondents-tenants-respondents

William F. Treanor (Mendes Hershman and Douglas N. Gordon with him on the brief), attorney for The Real Estate Board of New York, Inc., amicus curiae

Proskauer Rose Goetz & Mendelsohn (Howard Lichtenstein, Marvin Dicker and Abraham Borenstein of counsel), attorneys for Realty Advisory Board on Labor Relations, Inc., amicus curiae

Berger, Kramer & Sugerman (Robert Sugerman of counsel), attorneys for Ad Hoc Committee to Defend the Warranty of Habitability Law, amicus curiae

John E. Kirklin (Kalman Finkel, Morton B. Dicker, Gary R. Connor and Susan Seel with him on the brief), attorney for The Legal Aid Society of New York City, amicus curiae

Louis B. York (Peter M. Wendt and Nancy E. Le Blanc with him on the briefs), attorney for Manhattan Legal Services Corporation and MFY Legal Services, Inc., amicus curiae

Lindenbaum & Young (Abraham M. Lindenbaum of counsel), attorneys for Rent Stabilization Association of New York City, Inc., amicus curiae

1981—Park West Management Corp. v.
Arthur and Bess Mitchell, et al.

SANDLER, J.:

In this non-payment summary proceeding, petitioner-landlord, Park West Management Corporation, appeals by leave of this court from an order of the Appellate Term,

which affirmed a judgment of the Civil Court, New York County, granting tenants a 10% rent abatement on a counterclaim for an alleged breach of the warranty of habitability.

In the aftermath of the 17-day strike of building employees during May 1976, tenants of seven large apartment buildings, known as Park West Village, withheld their rent for the month of June. Summary non-payment proceedings were thereupon instituted in which the tenants raised the affirmative defense that the landlord had not provided essential services and thereby had breached the warranty of habitability.

It was agreed by stipulation that the decision to be rendered in the instant proceeding would bind some 400 tenants of the Park West Village apartments. It was also stipulated that the facts would be presented by way of written statements of both parties describing the circumstances and effects of the strike.

After a review of the written submissions, the Hearing Officer concluded that there had been an interruption (apparently extensive) of garbage removal and janitorial services, as well as a "limited number of service interruptions," and held that these constituted a breach of the warranty of habitability.

Relying in part on a formula developed by the Department of Rent and Housing Maintenance for controlled apartments, he determined that the loss in the rental value of the apartments sustained by the tenants justified a 10% set-off in their June rent bill.

In affirming, the Appellate Term noted that the formula in question was properly taken into consideration, but "may not be used as a substitute for an assessment of the damages established by the record." However, the Appellate

Term concluded that the record itself supported the ultimate finding.

This appeal requires this court for the first time to interpret and apply Real Property Law, Section 235-b, enacted into law in 1975.

Section 235-b, as originally enacted, provided:

> "1. In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties."
>
> "2. Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy."

In 1976, the legislature added subdivision 3:

> "3. In determining the amount of damages sustained by a tenant as a result of a breach of the warranty set forth in this section, the court need not require any expert testimony."

The purpose of Section 235-b was succinctly set forth in an authoritative statement on June 17, 1975 by Senator Barclay, its Senate sponsor:

Exhibit B

> "The contractual relationship between the two parties will be changed to put the tenant in parity legally with the landlord." (1975 Senate Journal, pp. 7766-7776)

Noting the development of the implied warranty of habitability in judicial decisions, Senator Barclay went on to say:

> "We will confirm the direction that the courts have been taking toward dealing with the question on the basis of contract law."

The decisions referred to in his statement reflected the increasing judgment of courts concerned with landlord-tenant proceedings that rules developed in an earlier era did not yield sensible or just results when applied to the realities of contemporary apartment living, and that the right of the landlord to receive rent (obviously of critical importance) had somehow become separated from and given preference to the right of tenants to live in apartments maintained decently and in accordance with requirements of law. See, *e.g.*, *Amanuensis Ltd.* v. *Brown*, 65 Misc 2d 15 (Civil Court, N.Y.); *Morbeth Realty Corp.* v. *Rosenshine*, 67 Misc 2d 325 (Civil Court, N.Y.); *Mannie Joseph, Inc.* v. *Stewart*, 71 Misc 2d 160 (Civil Court, N.Y.), *Tonetti* v. *Penati*, 48 AD 2d 25; *57 E. 54 Realty Corp.* v. *Gay Nineties Realty Corp.*, 71 Misc 2d 353 (App. Term, 1st Dept). See, also, *Javins* v. *First National Realty Corp.*, 428 F 2d 1071; *Marini* v. *Ireland*, 56 NJ 130; *Pines* v. *Perssion*, 14 Misc 2d 590.

Preliminarily we are satisfied that the record adequately supports the finding of the Hearing Officer that there had been a breach of the "covenant and warrant" deemed by Section 235-b to be part of every "written or oral lease or rental agreement for residential purposes." A substantial

deprivation of garbage disposal, janitorial and repair services for a 17-day period clearly involves the creation of conditions "dangerous, hazardous or detrimental to . . . life, health or safety."

The most far-reaching of the arguments advanced by petitioner, repeated in several different forms, is that Section 235-b was not intended to apply to conditions that resulted from events beyond the control of the landlord and implying no culpability on the landlord's part. Whether or not the strike may be so classified, which we doubt, the suggested interpretation does not seem to us tenable in the sweeping form presented.

It is true that many of the court decisions that shaped the doctrine of the implied warranty habitability were influenced by judicial concern for the deplorable conditions shown to have occurred where a small number of landlords callously disregarded their responsibilities. An equally significant factor, however, was a sense of injustice in requiring tenants, deprived of services essential to decent living to pay for that which they did not receive. See, e.g., *Steinberg* v. *Carreras*, 74 Mis 2d 32 (Civil Court, N.Y.) *modified on other grounds*, 77 Misc 2d 774 (App. Term, 1st Dept.); Cf. *Concord Realty Co.* v. *City of New York*, 30 NY 2d 308, 314.

Petitioner's interpretation would require a tenant to pay the entire stipulated rent where the landlord has been unable to discharge its obligations under Section 235-b through no fault of either the landlord or the tenant, and conditions detrimental to "life, health or safety" have resulted. The statutory language "covenant and warrant" has far too well-established a meaning in our law to be reconciled with this view.

Exhibit B

Like all general principles, the one here advanced may require qualification in the light of on-going experience. If, for example, a landlord at considerable expense did all that might reasonably be done to respond to conditions that developed from events truly beyond his control, a fair and realistic accommodation of the legitimate interests of both parties might suggest another approach.

For reasons similar to those stated above (and with a similar caution), it is clear that the requirements of Section 235-b may not be qualified or eliminated by lease provisions of a familiar kind that excuse the landlord's performance of his obligations "by reason of any cause beyond Landlord's reasonable control." Section 235-b(2) explicitly voids as contrary to public policy "any agreement by a lessee or tenant waiving or modifying his rights as set forth in this section."

The suggested analogy to *force majeure* provisions in commercial agreements is plainly inapposite here. Such provisions have been upheld to excuse the performance of a party under prescribed circumstances. They have not, however, been interpreted to permit the party excused from performance to receive compensation for that which he was unable to do, which would be the effective result of the application of that principle here.

The further argument that the section should be deemed inapplicable to provisions in leases signed prior to the enactment of the law also lacks merit. The section was unmistakably designed to codify and confirm a body of case law already in existence.

Nor do we find any support for the contention that Section 235-b should be deemed inapplicable with regard to rent controlled or rent stabilized apartment buildings. Nothing in the legislative history of the section suggests

such a drastic limitation on its effective application, nor is there anything in its language that provides the slightest basis for that view. The cases intended to be codified invariably involved rent controlled apartments, a fact surely known to the legislature when the section was enacted. And, of course, it was the decision of petitioner to commence the summary non-payment proceedings in the Housing Part of the Civil Court that inevitably resulted in the issue being litigated in that forum.

As to the 10% set-off awarded by the Hearing Officer, we are in agreement that the record adequately supports that determination. As to the general question of damages in such proceedings, an additional comment may be appropriate.

It is obvious that the determination of the set-off to be allowed a tenant where a breach of Section 235-b is established will often present problems of some difficulty. Mathematical certainty is not here to be excepted. This fact was clearly appreciated by the authors of the bill who quite purposefully drafted it "to leave the greatest degree of flexibility to the courts to fashion an appropriate remedy in each case." (Statement of Senator Barclay, June 17, 1975, *supra.*)

In that same statement, Senator Barclay went on to say:

> "Since we are treating a lease or rental agreement for residential premises as a contract, the full range of remedies in contract law could be considered by a court. . . . These include damages, specific performance, and recission . . .
>
> The most frequently applied measure of damages is likely to be the decrease in rental value caused by the breach. . . . This remedy closely parallels the rent reductions granted administratively under rent control

> for failure to maintain essential services. . . . Courts should be able to continue to apply generalized rules-of-thumb for determining the proportionate abatement appropriate for various types of breaches without having to resort to expert testimony."

No useful purpose would be served by detailing here at length approaches that might be suitable in widely varying factual situations. Formulas developed in analogous situations by specialized administrative agencies may appropriately be considered by the fact finder. Inevitably the issue will often require testimony by the tenants affected not only as to their factual observations but also as to the impact of the conditions described on their daily living.

That this possibility was contemplated by the legislature is clear. Subdivision 3, adopted in 1976, explicitly provided that "the court need not require any expert testimony." Testimony as to value by non-expert witnesses in certain situations is, of course, no novelty in our law. See *Richardson on Evidence,* Section 364 (10th ed). Cf. *Hangen* v. *Hachemeister,* 114 NY 566; *Cutler Hammer* v. *Troy,* 283 App Div 123.

The controlling principle was long ago stated by the Court of Appeals:

> "Where it is certain that damages have been caused by a breach of the contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach."

Wakeman v. *The Wheeler & Wilson Manufacturing Co.,* 101 NY 205, 209. See, also, 5 *Corbin on Contracts,* Section 1020.

Exhibit B

For the reasons stated, the order of the Appellate Term, entered June 23, 1977, affirming the judgment of the Civil Court, New York County (Hearing Officer Nason), should be affirmed, without costs.

All concur.

Exhibit C

(Decision of the Appellate Term, First Department)

APPELLATE TERM OF THE SUPREME COURT

FIRST DEPARTMENT

June, 1977

PRESENT:

HON. EDWARD R. DUDLEY, P.J.
HON. THOMAS J. HUGHES
HON. XAVIER C. RICCOBONO

Justices

No. 199

PARK WEST MANAGEMENT CORP.,

Petitioner-Landlord-Appellant,

—against—

ARTHUR AND BESS MITCHELL

Respondents-Tenants-Respondents.

Petitioner-landlord appeals from a final judgment of possession of the Civil Court of the City of New York, County of New York, (Housing Part) entered February 7, 1977, after trial (Nason, H.C.), which awarded landlord the full amount of rent due for the month of May 1976, less an amount equal to ten percent of such rent and granted petitioner judgment for the excess.

Exhibit C

PER CURIAM:

Final judgment entered February 7, 1977, after trial, (Nason, H.C.), affirmed with $25 costs.

The Hearing Officer determined that the tenants sustained a cognizable loss of services as a result of the Local 32B strike which lasted for seventeen days during the month of May, 1976. That determination is amply supported by the record, and, as we held in Goldner v. Doknovitch, 88 Misc. 2d 88, tenants are entitled to a set off reflecting the value of such depreciation of services.

Regarding the calculation of tenants' loss, the diminution of services to the tenants included interruption of garbage removal, janitorial services, repairs and exterminator services. The Hearing Officer apparently based his finding of the amount of such damage on a formula adopted by the Department of Rent and Housing in the case of controlled housing. While this formula was properly taken into consideration by the Hearing Officer, it may not be used as a substitute for an assessment of the damages established by the record. However, since this is a non-jury case and the record itself supports the ultimate finding of the Hearing Officer that the loss sustained by the tenants amounted to approximately ten percent of their rent, we make the factual finding that should have been made at Trial Term. Hence, we affirm the judgment.

I concur ERD

I concur TJH

I concur XCR

FILED
JUN 20, 1977

Exhibit D

(Opinion of the Civil Court of the City of New York)

Index Number 69126 Year 1976

CIVIL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK

HOUSING COURT PART C

HON. STANLEY H. NASON

PARK WEST MANAGEMENT CORP.,

Petitioner,

against

ARTHUR and BESS MITCHELL, *et al.*,

Respondent.

This proceeding is the bellwether for twenty similar proceedings presently before the court on submitted facts. By agreement between the parties, the determination in this proceeding will be binding on all parties to said twenty proceedings, and, in addition, will be binding upon some 380 other tenant families, members of the Park West Village Tenant Association.

This is another of the disputes between management and tenants over the extent of the tenant's rental obligation for the seventeen day maintenance worker's strike in May, 1976.

Respondent-tenants assert that as a result of the labor strike they were denied the beneficial use and enjoyment of their premises. They claim that for the period in question

the premises were filled with roaches and other vermin, stench and odor, flies from garbage, uncleanliness, unsanitary conditions and wet and dirty garbage throughout the premises. In addition to the foregoing, they assert that tenants were compelled to perform services themselves, such as garbage removal, extermination, cleaning of public halls, removal of garbage from public areas, cleaning of elevators and the making of minor repairs, for all of which they claim an abatement of rent is due them. Petitioner acknowledges its failure to collect garbage and the absence of janitorial services. In all other respects, Petitioner alleges that service and maintenance, albeit reduced, were provided.

It is now settled that the landlord and tenant relationship consists of something more than a conveyance of space for a stated term. It is now recognized that the relationship concerns both space and services. *57E 34 Realty Corp.* v. *Gay Nineties Realty Corp.*, 71 Misc 2d 353. Thus, whether the legal theory is founded in warranty of habitability *Goldner* v. *Doknovitch,* N.Y. L.J. 9/28/1976, Page 4, Col 1, App Term, 1st Dept; or Unjust Enrichment, *Kay* v. *Heller,* N.Y.L.J. 11/18/76, P11 Col 3; on rent monies worth, *Helmsley-Spear Inc.* v. *Luongo,* N.Y.L.J., 4/9/75, P 18 on Punitive damages, *Hipsborough Realty Corp.* v. *Goldbetten,* 367 N.Y.S. 2d 916, it is clear that a tenant has a right to receive the space and services bargained for. It is just as clear that the tenant has a remedy in damages, if proven, if the space and/or services are not in fact provided to an extent that exceeds mere annoyance on inconvenience.

A review of the submissions in the instant proceedings leads this court to the conclusion, and I so find, that with the exception of garbage removal, janitorial service and a limited number of service interruptions respondents suf-

fered only temporary inconvenience and annoyance. In this connection, it must be noted that the accumulation of garbage on the sidewalk, with the attendant stench dispersal by the elements and the increase in vermin was caused by the refusal of the city sanitation men to collect and remove the accumulation until the declaration of a health emergency by appropriate authorities. In addition, cognizance must be taken of the efforts of management to provide services through alternate methods. If this were not the case, and management were to be penalized for any and all interruptions beyond their control, despite such alternative methods there would then be no inducement for management to seek such alternatives and the situation would then tend to worsen.

Turning now to the measure of damages, this court is persuaded by the opinion in *Freund* v. *Washington Sq. Press,* 34 N.Y. 2d 379, to the effect that damages are to be measured by the loss to the respondents and not to the cost savings, if any, effectuated by management. I am similarly persuaded by the Freund opinion that relief on the theory of unjust enrichment is inappropriate and unnecessary.

As to respondent's loss, respondents in their brief, and though their submission has proven a diminished value amounting to 10% of the rent for the month of May. The Department of Rent & Housing Maintenance on form N-34.2 (Emergency) suggests a reduction of 5% of a month's rent for failure to provide garbage disposal and 10% a month for failure to provide janitorial services. The combined reduction amounts to 15% of a month's rent. This strike lasted 17 days or 55% of the month of May. 55% of 15% amounts to 8.2%. The incidental service in-

terruptions require an additional 1.8% abatement resulting in the 10% diminished value above referred to.

In view of the fact that so many rentals are involved, I deem a percentage result more appropriate than a determination of a specific dollar amount.

The issue of Petitioner's good standing as a member of the Rent Stabilization Association based upon the service interruptions above referred to should be raised before the Conciliation and Appeals Board, the body charged, by statute, with policing the good standing of the members of the association.

The foregoing constitutes the opinion of this Court—submit judgments—on three days' written notice in accordance herewith.

/s/ STANLEY H. NASON
STANLEY H. NASON, H.O.C.C.

Dated: April 7, 1977

Exhibit E

(Order Extending Time to File Petition for Writ of Certiorari)

SUPREME COURT OF THE UNITED STATES

No. A-166

PARK WEST MANAGEMENT CORPORATION,

Petitioner,

v.

ARTHUR MITCHELL, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 5, 1979.

/s/ HARRY A. BLACKMUN
Associate Justice of the Supreme Court of the United States

Dated this 28th
day of August, 1979

Exhibit F

(Force Majeure Clause)

"28. This lease and the obligation of Tenant to pay rent under this lease and to comply with all of the other provisions of this lease shall in no wise be affected, impaired or excused because Landlord is unable to fulfill any of its obligations under this lease or to supply or is delayed in supplying any service expressly or impliedly to be supplied or is unable to make or is delayed in making, any repairs, alterations, additions, decorations or improvements or is unable to supply or is delayed in supplying any fixtures, appliances or equipment if Landlord is prevented or delayed from so doing by reason of any cause beyond Landlord's reasonable control, including, but not limited to, strike or other labor trouble, Act of God, or of the public enemy, accident, any rule, order or regulation of any department or subdivision thereof of any governmental agency, governmental pre-emption in connection with any national emergency or war or the conditions of supply and demand which have been or are affected by war or other emergency."

Exhibit G

(New York Times Editorial)

A TENANT REFORM BECOMES UNTENABLE

In 1975, New York State legislators realized what was already obvious to anyone who had ever rented an apartment in New York—that the standard lease asked too much of the tenant and too little of the landlord. So they passed a bill that was supposed to even the balance. Now a court has interpreted the revised law in such a way that landlords may be asked to shoulder an unreasonable and even absurd burden. The law has tilted too far, and it needs to go back to the Legislature for rebalancing.

The State Court of Appeals ruled unanimously that apartments in a large complex had become uninhabitable because the city's sanitation workers refused to cross a picket line established by the landlord's striking building service employees. Because the 1975 lease law says a landlord, in renting an apartment, implies that it will always be "habitable," the court ruled that tenants could reduce their rents by 10 percent during the strike.

The problem with the law as it reads now is that it seems to be defining the terms of a bargain freely arrived at by both sides. It ignores the fact that most rents in New York State are now determined by law, not negotiation. An owner is forbidden to remove his property from the rental market even if the rent he must accept is too low for its maintenance. If the owner is required to warrant that the apartment will remain "habitable"—a word that the court explicitly said means far more than simply complying with government codes and regulations—then surely tenants who benefit from this interpretation should be required to warrant that they will pay enough rent to cover the costs of such habitability.

Exhibit G

Even if the rent were adequate to maintain the apartment, the court in this case imposed an impossible burden; the landlord is made responsible for *any* shortcomings, even one beyond his reasonable control. Abating rent during an employees' strike would seem fair enough if the landlord failed to provide replacement services. But holding the owner liable for the acts of uncontrollable third parties is surely unfair.

If the city's power supply fails, should the owners of buildings be prevented from collecting their full rents? If the midnight tootling of a cornet player makes life unbearable for the tenant below, can the sleepless refuse to pay—even if the courts refuse to permit landlords to evict cornet players? The Court of Appeals' decision on habitability may imply just such an interpretation.

The Legislature needs to make the obligations of tenants and of landlords still more precise. Improving the old lease is a worthy cause but frightening landlords out of the business will not make leases any more equitable nor housing any more habitable.

(New York Times, July 7, 1979, at 16, cols. 1 and 2.)